Supreme Court, U. S.
FILED
SEP 5 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1409

LONNIE NORTH,

Appellant,

vs.

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY,

Appellees.

On Appeal From The Court Of Appeals Of Kentucky

BRIEF FOR APPELLANT

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Appellees.

On Appeal From The Court Of Appeals Of Kentucky

BRIEF FOR APPELLANT

May It Please The Court:

(a)
OPINIONS BELOW

The first opinion of the Court of Appeals of Kentucky in this case, rendered August 12, 1974, is reported at 516 S.W. 2d 103, and is printed in the Appendix at Page 62. The second opinion of the Court of Kentucky on remand from this Court, rendered March 21, 1975, is unreported. A copy of the opinion appears in the Appendix at Page 63.

(b)
JURISDICTION

(i) Nature Of The Proceedings

This suit was filed by Appellant, North, in Harlan County, Kentucky Circuit Court seeking, by writ of *habeas corpus*, to secure his release from confinement in the Harlan County Jail under a sentence of 30 days imprisonment imposed by appellee, Russell, Lynch City Police Judge. North was convicted in the Lynch City Police Court of the crime of driving while intoxicated, fined $150.00, and imprisoned for a term of 30 days in the Harlan County Jail. North's driving privileges were also revoked. In the trial court, North maintained that his rights to due process and equal protection of the laws accorded to him as a citizen of the United States of America by the Fourteenth Amendment of the United States Constitution were abridged,[1] in that he was accused, tried and convicted in a court presided over by a judge, destitute of legal competency and capacity, but who derived his authority under certain Kentucky Statutes.

(1) Trial Court Proceedings

After issuing its writ of *habeas corpus* and enlarging the appellant on bail, the Harlan Circuit Court held a full evidentiary hearing on July 23, 1974, Appendix, pages 11-56. Following the hearing, it reluctantly dissolved the writ of *habeas corpus* under the precedent of

[1] The petition for writ of habeas corpus, raising the issues presented in this appeal in the Harlan Circuit Court, is printed in Appendix, pages 4-10.

Ditty v. Hampton, 490 S.W.2d 772 (Ky. 1972),[2] *dismissed as moot*, 414 U.S. 885 (1973), and ordered North remanded to the custody of the Harlan County Jailer, permitting him to continue on bail provided he file a notice of appeal to the Court of Appeals of Kentucky.[3] On July 23, 1974 appellant filed his designation of the entire record, together with his notice of appeal to the Court of Appeals of Kentucky. On August 5, 1974, he filed his motion for appeal and other necessary papers.

(2) Initial State Appellate Court Proceedings

On August 12, 1974, the Court of Appeals of Kentucky, the Court of last resort in Kentucky, affirmed *per curiam* the judgment of the Harlan Circuit Court, granting the motion for appeal, but denying the writ of *habeas corpus*, and setting aside North's bail, *North v. Russell*, 516 S.W. 2d 103 (Ky. 1974).

On August 26, 1974, North filed with the Court of Appeals of Kentucky his notice of appeal that the decision of the Court of Appeals of Kentucky was appealed to the Supreme Court of the United States of America pursuant to 28 *U.S.C. Section* 1257 (2) (1970).

(3) Previous United States Supreme Court Proceedings

That first appeal to this Court was docketed October 16, 1974 as number 74-437. On that appeal this Court

[2] The trial court dissolved the writ with reluctance and only after slapping the system that "allows persons of insufficient training, knowledge and experience to preside at criminal trials which, inherently, require a great deal of training, knowledge and experience in order that each citizen be accorded the rights guaranteed to him by the law".

[3] The opinion of the trial court is printed in the Appendix, pages 57-61.

vacated the judgment of the Kentucky Court of Appeals and remanded the case, *North v. Russell*, 516 S.W.2d 103 (Ky. 1974), *Judgment vacated*, 95 S.Ct. 673 (1974), to the Court of Appeals of Kentucky "for further consideration in light of the position presently asserted by the Commonwealth". The remand had been urged by the Attorney General of Kentucky upon his suggestion that North should be released "solely upon the basis of violations of Kentucky Law. . . ."

(4) Judgment On Remand And Notice Of Appeal

On March 21, 1975, the Court of Appeals of Kentucky, *while recognizing the absurdity of the lay judge system*, again affirmed the judgment of the trial court, noting that the Federal Constitutional questions urged throughout this case were the only questions presented on this appeal and that there were no state questions presented upon which North might be freed. See Appendix, Pages 63-66.

The Court of Appeals again refused to order North's release. On March 28, 1975, North again filed a Notice of Appeal that this most recent decision of the Court of Appeals was appealed to the United States Supreme Court pursuant to 28 U.S.C. 1257 (2) (1970), Jurisd. Stat., Appendix, 17a.

(5) Review Granted By The Supreme Court

On June 23, 1975, the United States Supreme Court noted probable jurisdiction in this case.

(ii) Statutes Conferring Jurisdiction

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1257 (2) (1970). Certiorari jurisdiction is conferred by 28 U.S.C. 1257 (3) (1970).

(c)

STATUTES AND CONSTITUTIONAL PROVISIONS

The validity of Kentucky Revised Statutes, Sections 26.010, 26.140, 26.150 (1), 26.200 and Kentucky Constitution, Section 130 are involved in this appeal.

Kentucky Revised Statute, Section 26.010 provides:

> "Except as provided in KRS 167.990, 208.020, subsection (4) of 208.990 and 242.990, police courts in *cities of every class* have jurisdiction exclusive of circuit courts in all penal and misdemeanor cases where the punishment is limited to a fine of not more than twenty dollars, jurisdiction concurrent with circuit courts of all penal and misdemeanor cases where the punishment is limited to a fine of not more than five hundred dollars, or imprisonment not exceeding twelve months, or both, and exclusive jurisdiction of all violations of city ordinances occurring within the city limits." (Emphasis added).

Kentucky Revised Statute, Section 26.140 provides:

> "The judge of the police court in cities of the *first class* shall have the qualifications and take the oath required of circuit judges. The judge shall devote his whole attention to the duties of his court. He shall have each year a vacation of two months. Subject to KRS 26.300, the judge may adopt rules and regulations for conducting the business of his court, and may enforce them by process of contempt. He shall have all powers necessary to try cases coming under his jurisdiction. He may administer oaths, and shall be a conservator of the peace. His salary shall be fixed by ordinance, and paid at the same time and in the same manner as the salaries of other city officers." (Emphasis added).

Kentucky Constitution, Section 130 provides:

> "No person shall be eligible as judge of the circuit court who is less than thirty-five years of age when elected, who is not a citizen of Kentucky, and a resident of the district in which he may be a candidate two years next preceding his election, and who has not been a practicing attorney eight years."

Kentucky Revised Statutes, Section 26.150(1) provides:

> "In cities of the *second class* the police court shall have one judge. He shall receive an annual salary of not more than $12,600 to be fixed by ordinance, and no other compensation except the fees allowed to judges for holding examining trials in felony cases. He shall have each year a vacation of one month. No person shall be eligible to be police judge unless at the time of his election he is at least twenty-five years of age and has been a resident of the city for at least four years, and is an attorney-at-law." (Emphasis added).

Kentucky Revised Statutes, Section 26.200 provides:

> "No person shall be eligible to be police judge in a city of the *fifth* or *sixth class* unless he is a resident and voter of the city, and has resided there for a year next preceding his election or appointment. Before entering upon the duties of his office, the judge shall execute a bond to the Commonwealth with good and sufficient sureties, approved by the county judge. The bond shall be filed and recorded in the county clerk's office and an entry made upon the order book of the county court, showing that the bond was executed and approved and giving the names of the sureties. The county judge, at any time that he has reason to believe that the bond is not good or that the sureties are about to become insolvent, shall require that a new bond be executed or additional sureties given on the old one." (Emphasis added).

The Statute under which the appellant is imprisoned is Kentucky Revised Statute, Section 189.520 (2):

> "No person shall operate a motor vehicle anywhere in this state while under the influence of intoxicating beverages or any drug which may impair one's driving ability."

Kentucky Revised Statutes, Section 189.990 (10)(a) (1972), provides:

> "Any person who violates subsection (2) of KRS 189.520 shall be fined, for the first offense, not less than $100.00 nor more than $500.00, and for each subsequent offense he shall be fined not less than $100.00 nor more than $500.00 and imprisoned for not more than six months."

United States Constitution, Amendment XIV, is involved in this appeal:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(d)

STATEMENT OF QUESTIONS PRESENTED

(1) Is Kentucky Revised Statute, Section 26.200, fixing the qualifications of police judges in fifth and sixth class cities, invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States of America, insofar as that statute subjects the appellant (a criminal defendant accused, convicted and sentenced to a term of imprisonment in a city court in a Kentucky fifth class city) to spurious trial, conviction and imprisonment before a judge: (a) who was untrained in the law and unfamiliar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States of America and the laws and Constitution of the Commonwealth of Kentucky; (b) who, because of such lack of training and unfamiliarity, lacked the capacity to afford the appellant a fair and impartial trial; and (c) who actually failed to provide appellant with a fair and impartial trial?

(2) Does the due process clause of the Fourteenth Amendment to the United States Constitution prohibit the spurious trial conviction and imprisonment of the appellant, a defendant accused of misdemeanor conduct in a Kentucky police court, before a tribunal presided over by a judge who: (a) was not cognizant or familiar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States and the laws and Constitution of the Commonwealth of Kentucky; who, because of such lack of training and familiarity, lacked the ability, capacity and competency to afford appellant a fair and impartial trial; and, actually failed to provide appellant with a fair and impartial trial; and, (b) was fully reliant on the city prosecutor for legal information and interpretation?

(3) Are Kentucky Revised Statutes, Section 26.010, 26.140, 26.150 (1), and 26.200 invalid under the equal protection clause of the Fourteenth Amendment to the United States Constitution, insofar as those statutes subject the appellant (a criminal defendant convicted and sentenced to a term of confinement in a city court in a fifth class city) to spurious trial, conviction, and imprisonment before a judge: (a) who was untrained in the law and unfamiliar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States and the laws and Constitution of the Commonwealth of Kentucky: (b) who, because of such lack of training and unfamiliarity, lacked the competency and capacity to afford appellant a fair and impartial trial; (c) who actually failed to provide appellant with a fair and impartial trial; whereas a criminal defendant accused of identical crimes in courts of identical name, territorial, and criminal jurisdiction in a first and second class city (designated as such solely on the basis of population) is accorded a judge trained and licensed as an attorney?

(e)
STATEMENT OF THE CASE

On July 10, 1974, the appellant, Lonnie North, was arrested in Lynch, Kentucky, and charged with the crime of driving while intoxicated denounced by Kentucky Revised Statutes 189.520 (2), penalty, 189.990 (10)(a), Appendix, Page 35. He was directed to appear for trial on July 18, 1974, at 7:00 P.M. before the Lynch City Police Court. This court is located in a Kentucky city of the fifth class[4] and is presided over by the appellee, C. B. Russell, Appendix, Page 14.

At the appointed time and place, North appeared for trial, and, upon entering a plea of "not guilty" demanded a trial by jury. The occurrences at the appellant's "trial" are substantially agreed upon by all the persons who testified in this action before the Harlan Circuit Court as follows:

(1) North entered a plea of "not guilty", (Appendix, Pages 26, 30, 36, 43, 45, 52).

(2) North demanded a jury trial to which he was entitled, Ky. Const., § 11, KRS § 25.010, (Appendix, Pages 30, 36).

(3) The appellee, C. B. Russell, called the city prosecuting attorney for advice as to whether or not he was required to grant appellant a jury trial, (Appendix, Pages 32, 37, 52).

(4) The appellee, C. B. Russell, advised the appellant that he was not required to grant to him a jury trial and that he would try him himself, (Appendix, Pages 31, 47).

(5) Appellee, C. B. Russell, after hearing only the arresting officer, adjudged the appellant guilty of the crime of driving while intoxicated and im-

[4] Kentucky Revised Statutes § 81.010.

posed a fine of $150.00, sentenced him to 30 days in the county jail,[5] and revoked his driver's license, (Appendix, Page 27).

(6) At his "trial", it is manifest that the Plaintiff received no hearing, (Appendix, Pages 38, 39, 43, 46, 52); that he was not advised of his right to trial by jury, (Appendix, Page 37); he did not have counsel present, nor was he advised of his right to have counsel present, (Appendix, Pages 37, 46); and that he was not advised of his right to confront the witnesses against him and to introduce evidence in his own behalf, (Appendix, Page 37).

(7) The City Police Court of the City of Lynch, Kentucky, is presided over by a "lay judge" who, admittedly, is not cognizant of the various constitutional, statutory, and common-law substantive and procedural rights guaranteed to the appellant as a citizen of Kentucky and as a citizen of the United States of America, and does not possess the necessary knowledge, understanding, training, or experience to enable him to accord to the appellant such various constitutional, statutory, and common-law substantive and procedural rights, (Appendix, Pages 14-25).

(8) The appellee, Russell, was fully dependent upon the city prosecuting attorney for decisions upon legal questions emerging during criminal trials, (Appendix, Page 17).

After having spent the better part of a full day in jail under the conviction, North, on July 19, 1974, filed in the Harlan Circuit Court a petition for writ of *habeas corpus* seeking his release.[6] A writ of *habeas corpus* issued on July 19, 1974, and was directed to appellee, C. B. Russell, the City Judge, and Nathaniel "Trap" Helton,

[5] Even the imprisonment imposed at this spurious "trial" was probably unauthorized since the penalty for the first offense is limited to a fine only and since the charge did not specify multiple offenses. KRS § 189.990(10)(a), (Appendix, page 25).

[6] Appendix, Pages 4-10.

the jailer to whose custody North was committed. On the same day, North was ordered release on bail. Following the hearing held at Harlan, Kentucky on July 23, 1974, the Harlan Circuit Court, after reciting the various constitutional challenges of appellant, dissolved the writ of *habeas corpus*. While expressing doubt about the soundness of the decision of the Court of Appeals of Kentucky in *Ditty v. Hampton, supra*, the court felt bound by that decision and ordered North remanded to custody, enlarging him on bail in the event that he should file a prompt notice of appeal to the Court of Appeals of Kentucky.[7] On the same day, July 23, 1974, he filed his Notice of Appeal and his designation of the entire record.

On August 5, 1974, North filed in the Court of Appeals of Kentucky his Motion for Appeal, together with the appropriate record and other necessary documents.

In the Court of Appeals of Kentucky, the constitutional arguments set forth in the petition for writ of *habeas corpus* and presented in this appeal were duly argued and presumably considered by the Court of Appeals since, on August 12, 1974, the Court of Appeals of Kentucky granted the motion for appeal and affirmed the decision of the Harlan Circuit court in its entirety, citing *Ditty v. Hampton, supra*, although it did set aside appellant's bail, *North v. Russell*, 516 S.W. 2d 103 (Ky. 1974)[8] Appellant was freed on a stay order by Honorable Justice Potter Stewart entered September 10, 1974.

The decision of the Court of Appeals was appealed to the Supreme Court of the United States and was docketed in this Court on October 16, 1974 as number 74-437. In his motion to dismiss or affirm, the Attorney

[7] Appendix, Pages 57-61
[8] Appendix, Page 62.

General suggested that this Court remand the case to the Kentucky Court of Appeals for "that Court's consideration of whether or not appellant should be granted a writ of *habeas corpus* solely upon the basis of violations of Kentucky law . . ." On December 23, 1974, this Court entered the following remand order:

> "Upon the representation of the Attorney General of Kentucky set forth in his motion to dismiss or affirm filed in this Court on November 29, 1974, the judgment is vacated and the case is remanded to the Court of Appeals of Kentucky for further consideration in light of the position presently asserted by the Commonwealth", 95 S. Ct. 673 (1974).

Upon remand to the Court of Appeals of Kentucky, the remand order was argued by briefs filed by both parties. The Attorney General presented to that Court the same contentions advanced in his motion to dismiss or affirm in this Court, that is, that appellant should be released upon the basis of violations of Kentucky law. North argued that such release would put him right back in Judge Russell's court for re-trial. On March 21, 1975, the Court of Appeals of Kentucky, again relying on *Ditty v. Hampton, supra*, rendered its final decision, denying North's release to freedom and holding that no state questions were presented in this appeal, Appendix, Pages 63-66.

On March 28, 1975, North filed his Notice of Appeal that the decision of the Court of Appeals of Kentucky was again appealed to the Supreme Court pursuant to 28 U.S.C. Section 1257 (2) (1970), Jurisd. Stat., Appendix, Page 17a. Probable jurisdiction was noted in this court on June 23, 1975.

In the trial court and in the Kentucky Court of Appeals, North attacked his conviction upon serious constitutional grounds.

(1) He challenged the constitutionality of KRS § 26.200, establishing the qualifications of police court judges in cities of the fifth class, as being repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States of America.

(2) He challenged the constitutionality of the statutory scheme embodied in Kentucky Revised Statutes,[9] Sections 26.010, 26.140, 26.150 (1), 26.200 and Kentucky Constitution, Section 130, as being unconstitutional and repugnant to the equal protection of laws provisions of the Fourteenth Amendment to the United States Constitution, upon the grounds of unequal and discriminatory treatment of him as an accused in a criminal case.

(3) He challenged the constitutionality of his conviction, alleging that the trial judge before whom he was tried, lacked the capacity and competency to accord to him the procedural and substantive rights guaranteed to him by the Constitution of the United States of America and the Constitution and laws of the Commonwealth of Kentucky and, because of such incompetency and because of such incapacity, he was, in fact, denied various of his constitutional rights under such laws.

The challenges set forth in paragraphs (1) and (2) above, since they allege the unconstitutionality of various Kentucky statutes upon specific federal constitutional grounds, are maintained in this appeal as a matter of right, pursuant to 28 U.S.C. 1257 (2). The third ground, specially setting forth a right, privilege or immunity under the Constitution of the United States of America, is maintained pursuant to 28 U.S.C. 1257 (3), under which this court is asked to exercise its discretionary writ of *certiorari*.

[9] Herein designated as "KRS".

In order to place the issues raised in this appeal in an appropriate context, it is necessary to outline the place of the police court in the Kentucky court structure. Candidly termed by the Kentucky Court of Appeals "courts of convenience" not equipped or designed "to conduct error-free trials, or to insure full recognition of constitutional freedoms.", *Colten v. Kentucky*, 467 S.W. 2d 374, 379 (Ky. 1971), *affirmed*, 407 U.S. 104 (1972), these inferior courts found in Kentucky's court system find historical roots in eighteenth century practices and needs. Transplanted from England, the institution of the lay judge, aided by a lack of legally trained persons and the deep-rooted distrust of centralized authority prevalent at the time, acquired considerable political influence in the governing bodies of the newly formed states. See, generally, R. Ireland, *The County Courts in Antebellum Kentucky* (1972). With the growth of the country, the institution retained its power and diverse array of functions, both political and judicial by virtue (a) of the continuing domination of state legislatures by rural interests, where lay judges continued to thrive, and (b) its glorified, but often uncritically accepted, heritage. That the institution survives today, however unsuited to the needs of the day, is a monument to the entrenched political nature of the office.

Description Of Kentucky's Inferior Court System

The Kentucky Revised Statutes create *four separate* inferior or "misdemeanor" courts, each having concurrent jurisdiction over penal and misdemeanor cases where the punishment is limited to a fine of not more than $500.00 or imprisonment for not more than 12 months or both. The county, quarterly and justices courts derive such jurisdiction by virtue of KRS 25.010 and the police courts of the various classes of cities

derive such jurisdiction by virtue of KRS 26.010. In other words, there are four separate inferior courts in Kentucky having simultaneous and concurrent penal and criminal jurisdiction over such misdemeanor cases. The county and quarterly courts are presided over by the same judge, *Kentucky Constitution, Section* 139. The county judge and the justices of the peace holding such jurisdiction are not required to be attorneys, nor to have any educational qualifications whatever, *Kentucky Constitution, Section* 100.

Only in cities of the first and second class is the police judge required to be an attorney, KRS 26.140, 26.150, 26.170, 26.190, and 26.200. The police court judges in other classes of cities need have no education whatever.

Under the above scheme there are hundreds of judges throughout Kentucky's 120 counties in the various county, quarterly, justice and city police courts empowered to preside in misdemeanor cases, wherein the maximum imprisonment which may be imposed is one year in the county jail and a fine of $500.00, Jurisd. Stat., Appendix, Page 35a, and the only ones of those inferior court judges who are required to be attorneys are those city police judges situated in first and second class cities in the Commonwealth of Kentucky of which there are only eight, KRS 81.010. A defendant convicted in Kentucky in any of the above courts has an unconditional right to a *de novo* appeal to the circuit court where the judge is, by law, mandated to be a lawyer, *Kentucky Constitution, Section* 130. For a more complete description of the Kentucky two-tier system, see *Colten v. Kentucky*, 407 U.S. 104 (1972).

The *qualifications* of a police court judge are statutorily prescribed. The Kentucky legislative scheme, pertinent parts of which are set out above, after conferring jurisdiction upon police courts in all classes of cities

(KRS § 26.010) mandates that accused criminal misdemeanants in first and second class cities, of which there are eight in the State, be accorded a judge who is a lawyer, while defendants in lower class cities may be, and almost invariably are, accorded a judge with no legal training and who, indeed, need have no education whatever. The overall scheme is based solely on a formula classifying cities by population, Kentucky Constitution, Section 156. Differing age and durational residency requirements are set out for police court judges in different classes of cities, *compare* KRS 26.170 with KRS 26.200.

Under Kentucky Law, the rules relating to the conduct of criminal prosecutions are substantially the same in all courts. *Kentucky Rules of Criminal Procedure*, in effect at the time of North's "Trial", *Section* 1.02, provides:

> "These rules of criminal procedure govern the procedure in the Courts of the Commonwealth of Kentucky in *all* criminal proceedings . . ."

Rule 1.04 provides:

> "The rules of criminal procedure are intended to provide for a just determination of *every* criminal proceeding . . ."

Rule 1.06 provides:

> "As used in these rules unless the context requires otherwise a 'magistrate' includes judges of circuit, county, and *police* courts and justices of the peace". (Emphasis added).

As provided in the sections above referred to, these rules apply to *all kinds of courts* mentioned in the rules, including the police court, *and to both felonies and misdemeanors.*

In addition to the rules of criminal procedure, there is now in effect in Kentucky the 1974 *Kentucky Penal Code*

(found in Kentucky Revised Statutes, Chapters 500 to 534) creating scores of crimes and containing provisions relating to both procedural and substantive aspects of criminal prosecutions. Other crimes are created and defined in other scattered parts of the Kentucky Revised Statutes.[10]

Summary Of The Jurisdiction Of Lynch Police Court

The new *Kentucky Penal Code* designates crimes in Kentucky as felonies or misdemeanors. It prescribes imprisonment for all "Class A" misdemeanors for a term not to exceed twelve (12) months, and a term of imprisonment for ninety (90) days for "Class B" misdemeanors. That Penal Code, found in Kentucky Revised Statutes, Chapters 500-534 creates fifty-eight (58) "Class A" misdemeanor crimes (involving imprisonment up to twelve (12) months) and thirty-one (31) "Class B" misdemeanor crimes (involving imprisonment for a term up to ninety (90) days). By virtue of KRS 26.010, the Lynch City Police Court and its presiding judge has jurisdiction concurrent with the Harlan Circuit Court in trials of such Class A and Class B misdemeanors. Of course, there are scores of other crimes listed throughout the Kentucky Statutes over which the Lynch City Police Court may, by virtue of KRS 26.010, exercise its criminal jurisdiction, including prosecution of violations for the crime for which the appellant now stands convicted; violation of local option laws (usually involving the issuance and execution of search warrants); and other similar statutory crimes *not listed* in the new penal code.

[10] See, e.g. 242.230, et seq. relating to prohibition.

Case Jurisdiction

Under the new Kentucky Penal Code (and because of KRS 26.010 conferring jurisdiction upon it) the Lynch Police Court and the appellee, Judge of that court, has jurisdiction to try and impose punishment by imprisonment *in such complex* crimes as *criminal attempt; criminal conspiracy; criminal solicitation; criminal facilitation; assault; menacing; reckless endangerment; terroristic threatening; unlawful imprisonment; criminal coercion; sexual abuse; sodomy; criminal trespass; criminal mischief; theft by extortion; forgery; criminal simulation; deceptive business practice; falsifying business records; defrauding secured creditors; issuing false financial statements; misapplication of entrusted property; commercial bribes; compounding of crime; tampering with public records; resisting arrest; hindering prosecution; perjury and false swearing; tampering with a witness or jury; riot; inciting to riot; unlawful assembly; disorderly conduct; harassment; loitering; gambling; prostitution;* and other various and sundry offenses.[11]

Under other sections of the Kentucky Revised Statutes, other misdemeanors involving imprisonment for a term not exceeding (12) months are defined, including violations of prohibition laws, prescribed by KRS 242.190, et seq., which, more often than not, involve the issuance and execution of search warrants upon a showing of probable cause.

[11] Kentucky Revised Statutes, Chapters 500 to 534.

Issuance Of Warrants Of Arrest And Search Warrants

KRS 26.330(3) authorizes a police court in cities of the various classes, including cities of the fifth class, to issue all processes. Such processes include warrants of arrest and search warrants. Under Kentucky law, search warrants may be issued only upon a showing of "probable cause", *Kentucky Constitution, Section* 10. There has developed in Kentucky a large body of law relating to the sufficiency of a sworn affidavit to show "probable cause" and the sufficiency of the search warrant itself to justify a search. See 17 *Kentucky Digest searches and seizures.*

An example of the power of Judge Russell to issue a search warrant may be found in *Kentucky Revised Statutes* 242.370, relating to prohibition.

Additionally, warrants of arrest must be issued only upon probable cause, *Kentucky Rules of Criminal Procedure,*[12] *Section* 2.04.

Preliminary Proceedings Upon Arrest

Upon arrest, a defendant in Kentucky must be taken before a magistrate without unnecessary delay, *RCr* 3.02, who must proceed with a trial, *RCr* 3.04, or admit the accused to bail. *RCr* 3.06.

In the preliminary proceedings a police judge must inform the defendant of the charge against him; of his right to trial; of his right to have counsel; and of his right against self-incrimination, *RCr* 3.08.

[12] Hereafter cited RCr.

In the administration of bail, the magistrate must determine the amount of bail, *RCr* 4.06, and must qualify the sureties, *RCr* 4.08.

A police judge may coerce the attendance of witnesses, *RCr* 7.04, and may permit discovery and use of discovery materials, *RCr* 7.08 - 7.26. The police judge has certain responsibilities relating to the assignment of counsel to indigents, *RCr* 8.04, and determinations of insanity, *RCr* 8.06. The police judge has responsibility for taking pleas, *RCr* 8.08, and receiving and ruling on various motions, *RCr* 8.16 - 8.26.

Trial

The police judge, upon trial of the case, is required to "order the sheriff or the attending officer to summon as many qualified jurors as are necessary to compose the jury . . .", *RCr* 9.30. He must be prepared to rule upon challenges to the panel based upon irregularities in empaneling the jury, *RCr* 9.34, and rule upon challenges to individual jurors based upon legal bias, *RCr* 9.36. He must be prepared to conduct or permit the examination of prospective jurors, *RCr* 9.38, and to grant preemptory challenges to the parties, *RCr* 9.40. The police court judge must be prepared to swear the jury to try the case and to conduct the trial in accordance with a preordained procedure, *RCr* 9.42.

It is appellant's contention that, because Judge Russell did not have the competency and capacity to accord him a fair, impartial and orderly trial, his right to due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States of America was abridged and that his sentence of imprisonment is, consequently, void.

(f)
SUMMARY OF ARGUMENTS

I. The justice of the peace system in America is under broad attack. The President's Commission on Law Enforcement and Administration of Justice describes the criminal court as the central institution in the criminal justice system. It recommends updating of state misdemeanor courts and the provision of criminal courts staffed by judges who are trained in the law. The recommendation of the Commission echoes a similar call by Dean Roscoe Pound made seventy years ago and by many other scholars, committee studies and organizations, including the American Bar Association. The need for competent judges is so imperative and progress so slow that the struggle has moved from state legislatures into the courts. There has occurred during the past fifteen years a criminal law "explosion" and the sweep of new law and court decisions affecting criminal trials is kaleidoscopic.

II. The trial of Lonnie North by a lay judge, destitute of legal knowledge or understanding of the substantive and procedural law essential to a fair trial, abridges North's right to due process of law as extended by the Fourteenth Amendment to the United States Constitution. Law by nature is technical and complex and the stakes involved are too high to risk trial before an untrained judge. This Court has on many occasions described the overwhelming difficulties that a layman faces when confronted with the complexities of law involved in a criminal proceeding. Absent a competent judge, the entire foundation of the adversary system is impaired and criminal trials become a mockery. With the implementation of *Argersinger, Infra*, complete in most states, the time is ripe for this Court to insure that

such lawyers will be practicing in courts presided over by judges capable of affording fair trials to all criminal defendants. The facts of this case conclusively show that appellee, Judge Russell, was utterly incapable of affording a fair trial to Lonnie North or to any criminal defendant and that trial in his court is a legal mockery. Lonnie North found himself incarcerated in the Harlan County Jail under sentence of thirty days under processes which can only be characterized as "shocking". His appeals to Kentucky courts were shunned even though the Court of Appeals of Kentucky recognized the "absurdity" of any system of law which requires trial before an untrained judge. The probability of unfairness pervades Judge Russell's courtroom, and, consistent with the Constitution, he should not be permitted to preside in any criminal case because of the probability that all criminal defendants facing trial in his court will be prejudiced. This court has in various types of cases, established a rule of *per se* unconstitutionality where the probability of prejudice infecting a trial is apparent. Such a rule of *per se* unconstitutionality should extend to all criminal trials presided over by untrained judges, where imprisonment is imposed.

III. The Kentucky Police Court scheme, providing licensed attorneys as judges in the police courts in first and second class cities, but judges with no qualifications in the same courts in other classes of cities, abridges North's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. The classification, based on population, is arbitrary and cannot be justified as necessary to the achievement of a compelling state interest. Nor can it be said that the classification rests upon some ground of difference, having a fair and substantial relation to the object of the legislation.

(g)

THE ARGUMENT

"Somewhere in the United States, in some small city or rural county seat, there must exist a courthouse where trials are held on time for everybody who wants one, where judges and lawyers perform their tasks ably, and where the public is treated courteously and justly." Downie, Justice Denied, Praeger Pub., Page 7.

I.

THE INHERENT UNFAIRNESS OF TRIAL BEFORE A JUDGE, UNINFORMED ON THE LAW RELATING TO THE CONDUCT OF CRIMINAL PROCEEDINGS, IS WELL-RECOGNIZED BOTH WITHIN AND WITHOUT THE PROFESSION AND HAS BEEN IMPLICITLY RECOGNIZED BY THIS COURT IN *SHADWICK v. CITY OF TAMPA, INFRA*.

(A) The Tradition of Criminal Trials Presided Over By Untrained Judges Is Under Broad Attack.

The President's Commission on Law Enforcement and Administration of Justice,[13] described the criminal court as follows:

> "The criminal court is the central, crucial institution in the criminal justice system . . . It is the institution around which the rest of the system has developed and to which the rest of the system is in large measure responsible . . ."

It is described in that Report as the institution which "is expected to articulate the community's most deeply held, most cherished views about the relationship of the individual and society".

This independent study profiles the complexities of the criminal law and the importance and magnitude of the

[13] The Challenge of Crime in a Free Society, United States Government Printing Office, February, 1967, Chapter 5, Page 125.

services rendered by criminal courts both to the individual and to society. The Report must be viewed as a sweeping indictment of the administration of criminal justice in the lower courts throughout most of the United States.

Noting the differential treatment accorded to defendants accused of only minor offenses, the Report states, *Page* 129:

> "A system that treats defendants who are charged with minor offenses with less dignity and consideration than it treats those who are charged with serious crimes is hard to justify . . . all criminal cases should be tried by judges of equal status under generally comparable procedures."

The Report, in dealing with justice of the peace courts in rural communities, notes that such courts continue to exercise some criminal jurisdiction in at least thirty-eight states, and that:

> "In more than thirty States justices of the peace are not required to be lawyers and the incompetence with which many perform their judicial functions has long been reported."[14]

Noticing the trend of many States toward reformation of justices courts, the Report recommends that justices of the peace courts be abolished and their functions transferred to district or circuit courts who have full-time professional standing, or that such courts be placed under a unified court system. Important to this case is the recommendation, *Page* 130:

> "All justices should be required to be *fully trained in the law* and in their duties and their level of com-

[14] It is important to the expanding concept of due process to note that twenty states have seen fit to require legal training, Wolf v. Colorado, 338 U.S. 25 (1949).

petence should be maintained by continuing training." (Emphasis added).

The recommendation of the President's Commission is an echo of the clarion call of Dean Roscoe Pound, made almost seventy years ago in his famous address to the American Bar Association at St. Paul on *"The Causes of Popular Dissatisfaction with the Administration of Justice,"* 29 *A.B.A. Rep.* 395 (1906), 40 *Am. L. Rev.* 729 (1906), calling for the unification of trial courts and defining, as one of the essentials of the sound administration of criminal justice, the provision of competent judges trained in the law.

In the intervening years between Dean Pound's prophetic call and the Report of the President's Commission, many scholars, commission studies, and organizations issued urgent calls for lower court reform[15] which calls have gone largely unheeded.

More recently, the house of Delegates of the American Bar Association in February, 1974, adopted the report of the American Bar Association's Project on Standards for Court Organization entitled, *"Court Organization"*. On *Page* 39, the Report observed that.

> "The quality of a court system is determined chiefly by the quality of its judges".

At *Section* 1.21(a), *Page* 40, it is recommended:

> "(a) Personal and professional qualifications. All persons selected as judges should be of good moral character, emotionally stable and mature, in good physical health, patient, courteous, and capable of deliberation and decisiveness when required to act on their own reasoned judgment. *They should have a*

[15] See Bibliography following conclusion, *infra*, for various references relating to lay Judges.

> *broad general and legal education and should have been admitted to the bar.* They should have had substantial experience in the practice, administration, or teaching of law for a term of years commensurate with the judicial office to which they are appointed. (Emphasis added).

The qualifications of Judge Russell (*Appendix, Pages* 14 *to* 24) fall somewhat short of these standards.

In recent years, the struggle to secure more competent judges has moved from the halls of state legislatures into the Courts. See, *e.g., Ditty v. Hampton*, 490 S.W. 2d 772 (Ky. 1972); *Gordon v. Justice Court*, 12 Cal. 3d 323, 525 P 2d 72 (1974); *City of Decatur v. Kushmer*, 43 Ill. 2d 334, 253 N.E. 2d 425 (1969); *State ex rel: Swan v. Freshour*, 219 Tenn. 482, 410 S.W. 2d 885 (1967); In re *Daly*, 294 *Minn.* 351, 200 N.W. 2d 913 (1972).

In short, most would agree that the lower courts, being those courts in which most accused persons find themselves, are central and crucial institutions in any criminal justice system, and that they are in serious need of reform. And most would agree that the provision of a competent judge is central to the need.

(B) The Criminal Law "Explosion" Has Made Essential The Provision Of Well-Informed Judges.

It is no exaggeration to say that, in recent years, a major portion of the business of the United States Supreme Court has involved problems relating to the administration of criminal law. Under the Bill of Rights and the Fourteenth Amendment to the United States Constitution, this Court during the last fifteen years has rendered hundreds of decisions defining public and individual rights in state criminal cases. Those decisions, it is submitted, are relevant not merely for the purpose of formulating propositions for debate in the halls of Harvard and other law schools, but are intended for use

in the administration of criminal justice in every criminal trial to which they are applicable. The broad sweep of those decisions is kaleidoscopic and tests the competency of even the best lawyer. Dealing with the *rights of indigents* (in respect of transcripts, right to counsel, payment of fines); *the rights and standards for trial by jury; confrontation of witnesses; double jeopardy; speedy trial; discovery and access to evidence; burdens of proof and presumptions; effect and acceptance of pleas; competency and commitment proceedings; self-incrimination and suppression of evidence; sufficiency of charges; sentencing; appeals; contempts; juvenile hearings; arrest; searches and seizures; confessions; eye witness identification; Fifth Amendment privileges, and other similar matters*, this Court has defined rights accruing to a defendant in a criminal case under the Federal Constitution which are, at the same time, of manifest importance and of great complexity. Added to this immense body of law are the various case decisions in state courts, codes of criminal procedure, criminal and penal statutes which must be considered in any given criminal prosecution, examples of which are described in this brief in the Statement of the Case, *supra*, Pages 22 to 24. The development of this body of law has been referred to as an "explosion".[16]

This immense growth in the corpus of the criminal law lends the greatest impetus to the need for trained and competent judges. It reflects the ever-expanding concept of the Fourteenth Amendment due process and, in and of itself, makes necessary the expansion of that concept to include adequate tribunals in which the due process concepts are formally administered. In *Wolf v. Colorado*, 338 U.S. 25 (1949), Mr. Justice Frankfurter wrote:

[16] HARRY JONES, The Courts, The Public and the Law Explosion, Prentice-Hall, Englewood Cliffs, 1965.

> "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. 338 U.S. at 27.

Our standards of what is deemed reasonable and right have today advanced to that point where the right to have a judge who is trained in the law is recognized as basic to our free society. And this Court has implicitly recognized the need for the introduction of well-trained and competent personnel into the criminal processes if due process rights are to be generally honored.

The President's Commission, *supra*, criticized the treatment of persons charged with minor offenses with less dignity and consideration than those accused of serious crimes and recommended the same measure of consideration for both. In *Argersinger v. Hamlin*, 407 US 25 (1972), this Court declined to make such a difference in respect of the right to counsel, holding that counsel was required in *every* case in which a term of imprisonment is imposed and irrespective of whether the crime charged was a felony or misdemeanor.

Argersinger holds that the trial of misdemeanor cases is often so complex and the specter of mischief so real that due process requires the assistance of counsel in all such cases involving imprisonment. Unless the accused's right to counsel is complemented by a competent judge, familiar with the legal processes relating to criminal trials, the lawyers mandated by *Argersinger* might just as well advance their arguments to an empty room and save their eloquence for a higher court.

In *Gordon v. Justice Court, supra*, the California court mandated lawyer judges in all cases upon the assumption that the due process requirement of counsel in a misdemeanor case similarly required the provision of lawyer judges in order that the argument of counsel, so provided, might have an intelligent forum.

The Court of Appeals of Kentucky in its most recent decision in this case, (*Appendix* 66), seems to attribute some constitutional cure in the provision of North's right to trial *de novo* in circuit court, citing *Colten v. Kentucky*, 407 U.S. 104, 112 (1972). We had thought this Court's decision in *Ward v. Monroeville*, 409 U.S. 57 (1972) made it clear that an accused may not be required to make his way through a legal thicket of thorns in order to avail himself of his fundamental right to fair and impartial tribunal, and that every defendant has the right to a fair trial in the *first instance*! The provision of trial *de novo* increases rather than mitigates the mischief and confesses its reality by appending an unconstitutional trial onto what should be a wholly constitutional process.

(C) Shadwick v. City of Tampa, 407 U.S. 345 (1972) Recognizes The Right Of An Accused To An Informed And Competent Judge.

In that case, this Court laid down a rather exacting standard in connection with the issuance of warrants by lay persons upon the showing of probable cause. In that case, the Court stated, (407 U.S. 345 at 350):

> "Thus an issuing magistrate must meet two tests. He must be neutral and detached and he must be capable of determining whether probable cause exists for the requested arrest or search."

This Court went further and said:

> "If, on the other hand, detachment and capacity do co-join, the magistrate has satisfied the Fourth Amendment's purpose."

Thus, even in connection with so simple a legal judgment as probable cause, this Court has required that the official making the legal determination of probable cause have the capability of making such determination. The holding in the *Shadwick* case is of considerable comfort to appellant, North, because the Court in that case made it very clear that a person exercising judicial functions in criminal cases must have the capacity to make considered legal judgments.

Of course, the appellant in the *Shadwick* case failed to show by any evidence that the clerk who issued the warrant in question was incapable of making a legal judgment as to whether probable cause for issuing the warrant existed. In this case, the transcript of evidence (Appendix 14 to 24) shows very clearly that Judge Russell was empowered to perform judicial functions which he was totally incapable by training, knowledge and experience to perform.

II.

TRIAL OF NORTH BY A LAY JUDGE, DEVOID OF KNOWLEDGE OR UNDERSTANDING OF THE SUBSTANTIVE AND PROCEDURAL LAW ESSENTIAL TO A FAIR TRIAL, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Lonnie North is a citizen of the United States of America. On the night of July 18, 1974, and on into the afternoon of the following day, he found himself locked in the Harlan County Jail, one of the jails in the State of Kentucky which was recently studied by the Commonwealth of Kentucky and whose facilities were

characterized as "very poor".[17] He was there because he was unfortunate enough to have been accused in the Lynch Police Court before a judge who was destitute of legal training and knowledge. He was under a thirty-day sentence of incarceration growing out of a proceeding which was star-chamber and in which virtually every right that he enjoyed under his citizenship was abridged. Feeling himself entitled to better treatment because of his United States citizenship, he appealed to the Harlan Circuit Court by *Habeas Corpus* to vindicate his right as a citizen to be tried by a judge cognizant of his various rights. The Harlan Circuit Court, acknowledging that the allegations in the Petition for Writ of *Habeas Corpus* were substantially true, reluctantly dissolved the writ as it was required to do under the holding of the Kentucky Court of Appeals in the *Ditty* case, *supra*. North appealed to the highest court of Kentucky, the Court of Appeals, for vindication of his right to a fair and orderly trial presided over by a Judge capable of assuring such a trial, but was again denied under the rule of the *Ditty* case, although the court recognized the "absurdity" of the system. In the state court he alleged and argued the unconstitutionality of *KRS* 26.200, contending that the statute, fixing the qualifications of police court judges in cities of the fifth and sixth classes, is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States, for the reason that it subjected him to imprisonment by a judge who has not the competency, capacity, knowledge and understanding of his procedural and substantive rights, so as to accord to the appellant those rights secured to him by the Constitution and laws of Kentucky and by the Constitution of the United States of America, Appendix, Pages 4-10.

[17] Report, Jail Consultant Program, Kentucky Department of Corrections, July, 1975.

The transcript depicting the trial of Lonnie North by Judge Russell is a stark example of the prejudice too often encountered by a criminal defendant when tried by a lay judge. The processes under which he was convicted can only be characterized as "shocking". The probability of an unfair hearing pervades Judge Russell's courtroom and, consistent with the Constitution, he should not be permitted to preside in criminal trials because of the inherent probability that all criminal defendants facing trial in his court will be prejudiced in their ability to obtain a fair and impartial hearing.

To argue that the presence or absence of legal training and knowledge in a judge makes no difference in the quality of justice he dispenses would be patently absurd. To do so is to conclude that legal training and knowledge of the law are irrelevant and unnecessary to the process of legal decision-making and the exercise of judicial functions.

It is the contention of the appellant that this appeal of Lonnie North vs. C.B. Russell, et al, is almost companion with the *Argersinger* case and that due process exigencies inherent in a criminal trial are practically the same in both situations, that is, if the fundamental right to a fair trial is abridged *per se* where imprisonment is imposed without aid of counsel, due process rights are similarly abridged where imprisonment is imposed without the aid of a competent and legally trained trial judge. After much consideration, appellant adopts the position and does urge this Court to acknowledge the probability of due process abridgment in a criminal trial presided over by an untrained judge and avoid the possibility of such abridgment by requiring Kentucky, in the exercise of its criminal powers, to provide a presiding judge who is an attorney, where the accused is ordered imprisoned after a plea of innocence. Such a

holding by this Court would not be novel. It would be consistent with the decision in *Argersinger* and the Court has rendered other similar decisions in other types of cases establishing *per se* rules of unconstitutionality.

For example, this Court invalidated the televising of courtroom proceedings in a criminal trial upon the ground that such procedure is repugnant to the fundamental right to a fair trial as guaranteed by the Fourteenth Amendment, *Estes v. Texas* 381 U.S. 532 (1965). In that case the Court stated:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process", *Id. at* 542-43.

See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).

Moreover, this Court has, in some cases, promulgated a rule of unconstitutionality in an endeavor to prevent even the possibility of unfairness in criminal proceedings. See *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Bruton v. United States*, 391 U.S. 123 (1968); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Jackson v. Denno*, 378 U.S. 368 (1964); *Argersinger v. Hamlin*, *supra*.

In terms of probabilities of due process abridgment in a criminal trial presided over by a lay judge, this Court has already spoken on the deficiencies of lay persons to make legal judgments. In *Jackson v. Denno*, 378 U.S. 368 (1964), this Court held that a procedure that leaves the factual determination of the voluntariness of a confession to a jury is invalid in view of the possible inability of a jury to disregard the substance of the confession while at the same time ruling on its admissibility. In *Bruton v. United States*, 391 U.S. 123 (1968), involving the use of a confession of one defendant in a joint trial, the Court stated at Page 135:

> "Nevertheless, as was recognized in *Jackson v. Denno*, supra, there are some contexts in which the risks that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored".

These cases recognize the inability of lay persons to make the nice legal judgments required in a criminal prosecution and the inability of the lay person to segregate the issue of "truthfulness" from the issue of "admissibility" and the issue of "admissibility" from the issue of "guilt".

Again, lack of legal training necessarily involves the danger of over-reliance by the judge on the prosecuting attorney. Anyone familiar with the trial process will recognize that counsel are far more likely to clash than agree on points of law in virtually every juncture of the trial process. Clashes of counsel usually occur in the *voir dire* examinations of prospective jurors on such issues as dismissal of a juror for cause, and continue throughout the trial where the judge is repeatedly called upon to make decisions upon the admissibility of alleged hearsay evidence, opinion evidence, questions of materiality and relevance, impeachment evidence, on probative value of circumstantial or demonstrative evidence, and to weigh the evidence in light of its sufficiency to support a verdict. Finally, there is a direct and causal relationship between Judge Russell's lack of legal knowledge and his necessary reliance on the City Attorney, the prosecutor,

for all legal advice, (*Appendix* 16). *The probability of due process* abridgment by reliance on the prosecutor by an untrained judge is very real. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the Court set a rigid standard in such case where a trial judge may be possibly tempted to overlook the competing claims of the prosecution and the defense:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denied the latter due process of law". Id. at 532.

The foregoing are but examples evidencing the probability of due process abridgment inherent in every trial presided over by an untrained judge.

Accordingly, the Court is urged to adopt in this case a rule of "*per se*" unconstitutionality of trials, involving imprisonment, by a lay judge in a criminal case as violative of the North's Fourteenth Amendment rights to due process of law, based upon the manifest *probability* of due process abridgment, in order that the specter of abridgment of a right so fundamental as a right to a fair trial might be avoided.

In doing so, we urge this Court to apply a rule of inherent prejudice in striking down the practice of trial and imprisonment in criminal courts presided over by lay judges, even though, "one cannot put his finger on its specific mischief and prove with particularity where he was prejudiced", *Estes v. State of Texas*, 381 U.S. 532, 544 (1965). Such a rule would assure to Lonnie North that, upon re-trial of his case, he would be presented with a court presided over by a judge capable by training and experience to accord to him his fundamental right to a fair, impartial and orderly trial and competent "to hold the balance nice, clean and true between

the State and the accused", *Tumey v. Ohio, supra.* If a rule of *per se* unconstitutionality is inappropriate, we then urge the Court to define minimal due process qualifications of judicial competency and capacity, making a judge's competency and capacity to preside in a criminal trial the subject of due process inquiry on a case-by-case basis.

We submit that the concept of a fair trial under the Fourteenth Amendment includes the right of North to be tried by a judge knowledgeable of the relevant law and able to comprehend counsel. Absent such a minimally competent judge, the entire foundation of the adversary system is impaired and justice becomes a mockery, for the procedural and substantive safeguards designed to assure a fair trial are ignored, or at best, ineptly applied. See Traynor, *Rising Standards of Courts and Judges*, 40 Calif. SBJ 677, 690 (1955) ("The finest tools may still botch a job in the hands of an inept carpenter"). If the concept of *ordered* liberty, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), is to have any meaning, it must include recognition by the expositors of the law of the basic guarantees underlying our system of justice. This recognition and accompanying expertise, "the keystone of the whole venture", *In Re: Gault*, 387 U.S. 1, (1967), is markedly absent in the inferior courts of Kentucky and, according to most commentators, in the lower courts of other states. With the implementation of *Argersinger v. Hamlin*, 407 U.S. 25 (1972), extending the right to counsel in misdemeanor cases, nearly complete in most states, the time is ripe for this Court to insure that the *Argersinger* mandated lawyers will be practicing before judges who are capable of affording a fair trial to all criminal defendants.

A fair and orderly trial in Judge Russell's court, in accordance with prescribed due process standards, is a virtual impossibility. The facts in this case conclusively show that Judge Russell was utterly incapable of affording a fair trial to Lonnie North or, for that matter, to any criminal defendant. Without any legal training, Judge Russell was totally ill-equipped to comprehend the rules of evidence or the applicable rules of criminal procedure. Even if he desired to educate himself in particular cases, his sources of independent information were few. Even more revealing is Judge Russell's candid admission that he is virtually unfamiliar with the Bill of Rights and their interpretation by this Court in criminal cases and only nominally familiar with state criminal law, (Appendix, Pages 18-21). With this meager background, Judge Russell exercised in Lonnie North's case the kind of unfettered discretion antithetical to the concept of ordered liberty implicit in our notion of a fair trial. Without rules and principles as touchstones to decision, due process is simply nonexistent in Judge Russell's courtroom. And any trial conducted by him becomes a legal mockery.

Law, by nature, is technical and complex. Because of the ultimate stakes involved, the criminal law has evolved into a panoply of rules and procedures, often containing subtle distinctions, which must be applied to the unique facts of a particular case with diligence and sensitivity by the presiding judge. Even in so-called minor or petty offenses this Court has recognized that the "legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are (no) less complex than when a person can be sent off for six months or more." *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972).

Without schooling in the fundamentals of legal analysis and reasoning, an untrained and unversed judge inevitably decides each case on the basis of uninformed discretion, which "however benevolently motivated, is . . . a poor substitute for principle and procedure, *In re Gault*, 387 U.S. 1, 18 (1967). Exercising "common sense", the judge turns the rule of law, integral to the preservation of society, into rule by fiat and whimsy. Dean Roscoe Pound has trenchantly observed how typical lay judges irresistibly make a mockery of justice:

> "With no training in the law, no training in process of judicial thought, and no mental habit of mind acquired by constant experience in legal reasoning, it would indeed be strange if a (lay judge) did not treat each case as a unique proposition. He has no category or class into which he may place it, no analogies from which to draw to solve the new problem before him. He has no legal rules, principles or standards by which to judge the merits of the controversy to be decided. Wholly unlike the judge who is trained in the law, he has no precedents to guide him. In deciding the cause before him the lay judge is necessarily limited by his own personal experience acquired in the short span of a single lifetime. He cannot call on the legal experience of the ages to assist him but is helpless to any more than apply his own personal notions of right or wrong to the case at hand. The justice which such tribunal is capable of dispensing is but the outcropping of the experiences of a personality, often limited and warped by passion and prejudice, and at best, as variable as the personalities of the justices who comprise (the system) . . . Such justice is not justice at all. It is unequal, uncertain and capricious." R. Pound, Outlines of Lectures on Jurisprudence 75 (3d ed. 1963).

Stated most simply, the archaic system challenged in this case cannot comport with the demands of modern-day justice.

On many occasions, this Court has described the overwhelming difficulties any layman faces when confronted with the complexities of the law in the context of a criminal proceeding. In *Johnson v. Zerbst*, 304 U.S. 458 (1938), for example, the Court stated an obvious truth:

> "That which is simple, orderly, and necessary to the lawyer to the untrained layman may appear intricate, complex, mysterious", *Id. at* 462-63.

Perhaps the most persuasive line of cases supporting the concept of a legally knowledgeable tribunal as a necessary component of a fair trial are those cases articulating and extending the right to counsel in criminal cases. Inherent in the holdings of *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Argersinger v. Hamlin*, 407 U.S. 25 (1972) is the inexorable corollary that the defendant's right to counsel and to a fair trial includes, both on Sixth and Fourteenth Amendment grounds, the right to a judge who is mentally equipped to comprehend the arguments of counsel and to conduct a trial in a manner most conducive to the emergence of truth. These cases explicitly recognize the competence only a lawyer can bring to the defense of an accused and the fair application of the law, and emphasize, however implicitly, that counsel and the court must complement each other to insure the proper functioning of our adversary system of justice. See, generally, *D. Peck, The Complement of Court and Counsel* (1954).

III.

THE KENTUCKY POLICE COURT SCHEME IS REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As the structure of the Kentucky police court system described above reveals, whether an accused stands trial

before a lay judge or an attorney judge depends on his *whereabouts*. If a person is charged with a misdemeanor in Lexington, Kentucky, a second class city, he is accorded a judge required by statute to be a lawyer. If the same person is charged with the same misdemeanor 18 miles away in Paris, Kentucky, a fourth class city, he might be compelled to stand trial before a lay judge. Yet jurisdiction is conferred upon both courts by the same statute, *KRS* 26.010; both courts bear the same name; and both courts have the same territorial and other jurisdiction. The historical antecedents of this scheme, in days when means of transportation and communication were not as sophisticated, perhaps justified a differential treatment. But, in 1974, such a system finds little practical justification. In *Ditty v. Hampton, supra*, cited by the Kentucky Court of Appeals in its decision, the legislative justification was said to be (*Page* 776):

> "1. The greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously (not necessarily with more fairness and impartiality).
> 2. Lawyers with whom to staff the courts are more available in the larger cities.
> 3. The larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts. *Cf. Metcalf v. Howard*, 304 Ky. 498, 201. S.W. 2d 1970."

In light of the unequal treatment accorded criminal defendants by the Kentucky police court scheme, Appellant submits that, under standards applied by this Court to test the compatibility of burdensome legislative classifications with the equal protection clause, this arrangement must be invalidated upon the following considerations:

(A) The Kentucky Police Court Scheme Impinges Upon Appellant's Fundamental Right To A Fair Trial And Cannot Be Justified As Necessary To The Achievement Of A Compelling State Interest.

In a variety of cases this Court has applied an exacting standard of precision to statutory classifications affecting *fundamental* constitutional rights of individuals. In these cases, the Court has placed a heavy burden on the state to demonstrate that, (a) such laws are "necessary to promote a compelling state interest", *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), and (b) that the means chosen by the state in pursuing even very substantial interests are the least restrictive methods of achieving the asserted goals of the legislation, *Id.* at 631. See *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972). By requiring states to carefully tailor discriminatory classifications, the Court has extended constitutional safeguards to *all* citizens within a state, not merely those favored by imprecisely drawn classifications which are often based on outmoded facts and theories having little, if any, justification in modern times. When measured against the demanding standard of *Shapiro*, this Kentucky police court scheme cannot stand.

(1) The Impingement

As a threshold consideration, it is clear that the statutory scheme permitting uninformed judges to try criminal cases impinges upon a defendant's fundamental right to a fair trial, *Gordon v. Justice Court, supra.* As discussed more fully below, the lay judge's ignorance of the basic constitutional protections essential to a fair trial—in this regard, it is important to note that most of the explicit protections of the first ten amendments relate to the trial stage—inherently prejudices and burdens a defendant's right to a fair trial, called in *Estes v. Texas*, 381 U.S. 532, 540 (1965), "the most fundamental of all freedoms" and *In re Murchison*, 349 U.S. 133, 136 (1955), "a basic requirement of due process".[18] By definition, a fair trial can only be had when the rules and limitations governing the trial are recognized and studiously honored. These rules and limitations serve as a necessary precondition to our concept of a fair trial. Without their recognition and knowledgeable interpretation and application by the judge, whose distinct role it is to assure the defendant a fair trial consistent with these established safeguards, a fair trial is an impossibility.[19] This case is one monument to that fact.

A criminal trial, even in a misdemeanor case, involves the writing of a charge; fixing of bail; giving notice of the charge; making appropriate provisions for counsel; summoning a jury; empaneling a jury in accordance with technical legal standards; observing very technical and precise procedural and substantive rules, both codified and uncodified, relating to the order of the hearing, reception of evidence, handling of motions, instructing the jury, and receiving and enforcing a verdict; and the many and varied rules, both procedural and substantive, relating to post-trial proceedings and appeals. Rules relating to this criminal process are found in codes of procedure, statutes, state and federal constitutions, and in a great body of common law related by court decisions. Every state has recognized the technical nature of this process and the extensive learn-

[18] This Court has recognized that the right to a fair trial is guaranteed in trial courts at all levels and that a "State's trial court procedure (cannot) be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication", Ward v. Village of Monroeville, 409 U.S. 57, 61 (1972).

[19] In its most recent decision in this case the Kentucky Court said: "We fully appreciate the absurdity of having a lawsuit—any lawsuit—presided over in this day and age by a person without legal training or experience".

ing required to master it, and has imposed license standards upon any person who would practice the legal arts.

In this context, Lonnie North found himself charged with a crime and facing loss of his liberty. His trial was programed by the State and Federal Constitutions and by the procedural and substantive rules of law of Kentucky to be both fair and orderly. Unfortunately, there is in Kentucky's criminal processes a kind of legal hypocrisy which empties the system of all of these protections by entrusting the trial of his case to a police judge devoid of legal knowledge or understanding. Judge Russell professes much "common sense", (Appendix Page 24), but admits that he knows nothing at all about the various procedural and substantive rights accorded North as a citizen of Kentucky and of the United States. Who can read the transcript in the trial court without concern for the incredible incompetency of Judge Russell, whose judicial authority is sanctioned by the very statutes which we now challenge? And who can but feel sympathy and emphatic indignation at the shameful way in which North was accorded the most fundamental of his civil rights—the right to a fair and orderly trial?

(2) The Justifications

Once it is concluded that a *fundamental* constitutional guarantee is diluted by the operation of the Kentucky statutory scheme, the state must demonstrate that the classifications are necessary to the achievement of a compelling state interest, *Shapiro v. Thompson, supra.* In light of the three reasons offered by the Kentucky Court of Appeals in *Ditty v. Hampton, supra,* as the justification for these provisions, no such showing is made:

First, logic and experience sustains the court's proposition that "the greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously". But, if it is the denial of the right to a fair trial that is in question, this justification is meaningless. It certainly is no reason for depriving one group of citizens of the benefits resulting from such efficiency and expedition. It is well recognized, moreover, that "the Constitution recognizes higher values than speed and efficiency", *Stanley v. Illinois* 405 U.S. 645, 656 (1972).

Second, the justification that "lawyers with whom to staff the courts are more available in the larger cities", while perhaps compelling eighty years ago, cannot stand as even reasonable in 1974, when transportation capabilities and lawyer density patterns reveal that there is more than sufficient legal manpower to staff the courts. (See *Martindale-Hubbell Law Directory,* showing lawyer distribution patterns in Kentucky). Belying this justification is the theoretical provision of counsel, as required by *Argersinger v. Hamlin,* 407 U.S. 25 (1972), to all criminal defendants in even the most remote courtrooms in Kentucky.[20] Moreover, to further its interests, the state has available to it alternative "less drastic means" which recognize the rural-urban disparity in legal manpower but still advance the state's objectives. For example, the state might follow the federal lead in requiring bar membership for inferior court judges—magistrates, in the federal system—unless there is a demonstrable showing that no attorney is available in the particular locale, 28 U.S.C. Section 631 (b) or in permitting an accused to elect to stand trial before an attorney judge in a higher court, 18 U.S.C. Section 3401 (b).

[20] Implementation of Argersinger in lay courts is often more theoretical than real, as any outland lawyer will attest.

Third, the notion that "the larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts" is an obviously insubstantial consideration under the strict scrutiny test. See *Shapiro v. Thompson, supra.* If financial resources available in a particular area is to be a justifiable standard of approved fairness in a criminal trial, then we place a price tag on our fundamental freedom—an intolerable concept.

It is clear that the classification cannot be sustained under the "compelling state interest" test, nor, as we will see, can it be sustained under the less restrictive "rational basis" test.

(B) The Kentucky Police Court Scheme Establishes Classifications On The Basis Of Criteria Wholly Unrelated To The Objectives Of The Statutes And Therefore Violates The Equal Protection Clause Of The Fourteenth Amendment.

Under the less restrictive scrutiny standard articulated by this Court on numerous occasions, the Kentucky police court scheme is untenable. In *Reed v. Reed,* 404 U.S. 71 (1971), where a unanimous Court invalidated an Idaho probate provision giving men mandatory preference over women when persons of the same priority class applied for appointment to administer a decedent's estate, Chief Justice Burger articulated the now applicable standard for such differential treatment:

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to the states the power to treat different classes of persons in different ways. The Equal Protection clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A

> classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'."

Under this standard, the constitutionality of the Kentucky scheme depends on whether the *population criteria* (which is the basis of the challenged classifications) substantially advance the legislative purposes of the statutes. North submits that they do not in any rationally justifiable way. The Court of Appeals of Kentucky in *Ditty v. Hampton, supra,* described the three objectives of the classification as being the provision of lawyer judges in metropolitan areas where the volume of court business was greater, where lawyers are more readily available and where greater financial resources may be found. The object of the classification must, on the other hand, be conversely interpreted as an attempt at a justifiable *relaxation of standards* of judicial competence in rural areas, where, because of population, these three objectives may not be met.

First, as we have seen, there is no necessarily consistent or rational correlation between the class city and the number of lawyers practicing therein. Moreover, even the small number of lawyers in many lower class cities are sufficient to handle the small amount of judicial business transacted in those cities.

Second, the differential treatment is attributed by the Court of Appeals to docket considerations, the court inferring from the legislation that, because of the greater case loads in urban areas, lawyer judges are required to promote efficiency and expedition of the case load. This seems a slight basis upon which to excuse a discriminatory practice. If appellant's court experience is any indication Judge Russell's disposition of criminal charges is both efficient and expeditious.

Finally, the court inferred from the legislation that another objective of the Kentucky Legislature was to require lawyer judges in urban counties, where money is available to pay them, but to require no such judges in those smaller towns where the cities presumably could not afford a lawyer judge. To group all lower-population cities in this fiscal category is, on its face, over-inclusive and conjectural.

The objectives, purposes, and reasons for the discrimination conjectured by the Court of Appeals (fiscal consideration, availability of lawyers, and docket demands) are no justification for the differential treatment accorded the differing classes. The differential treatment by class is patently overinclusive and the reasons advanced for such differential treatment will not withstand this Court's requirement of reasonableness.

Accordingly, it is submitted that the statutes creating this invidious discrimination are unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution and violate appellant's rights as a citizen of the United States.

CONCLUSION

In this appeal we urge the Court to energize the right to counsel defined in the *Argersinger* case by requiring Kentucky, in the exercise of its criminal jurisdiction, to provide Lonnie North with a forum presided over by a judge capable of understanding argument of such counsel, and administering a fair and impartial trial with all that the term implies.

In doing so, we first urge this Court to go the whole way and declare that, in any case in which an accused *is imprisoned* under a plea of innocence, the trial leading to such imprisonment must be conducted by a licensed attorney as presiding judge. This holding would comport with the effect of the decision in *Argersinger* and would give Lonnie North more assurance that his rights as a citizen will be respected upon his re-trial.

In rendering such decision North asks the Court to declare that the due process clause of the Fourteenth Amendment to the United States Constitution requires that no sentence of incarceration of any accused in a criminal case may be imposed under a plea of innocence unless the accused is tried before a tribunal presided over by a licensed attorney, and that *KRS* 26.200, authorizing trial before a "lay" judge is unconstitutional *per se* under the Fourteenth Amendment to the United States Constitution in the context of such imprisonment.

Alternatively, we ask the Court to declare the statutory scheme, establishing qualifications of trial judges in the various classes of Kentucky cities, unconstitutional as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

We ask that the judgment of conviction be vacated and that this case be remanded to Kentucky with directions that Lonnie North be accorded a trial presided over by a competent and legally-informed Judge.

Respectfully submitted,

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The Justice of the Peace, being of ancient origin, has received some colorful literary attention, much of which deals with its bent for pomposity, ignorance of the law, and venality. Classic are Justices Shallow and Silence in Shakespeare's *Henry IV* and Justice Overdo of Ben Jonson's *Bartholomew Fair*. And Henry Fielding's reference to Justice Thrasher in *Amelia (Volume* 1, *Harper and Brothers Pub.* (1902), pp. 16-17), written in 1751 illustrates that history has not taken too kindly to the justices:

"The higher we proceed among our public officers and magistrates, the less defects of this kind will perhaps be observable. Mr. Thrasher, however, the justice before whom the prisoners above mentioned were now brought, had some few imperfections in his magistratical capacity. I own I have been sometimes inclined to think that this office of a justice of peace requires some knowledge of the law, for this simple reason: because, in every case which comes before him, he is to judge and act according to law. Again, as these laws are contained in a great variety of books, the statutes which relate to the office of a justice of peace making themselves at least two large volumes in folio; and that part of his jurisdiction which is founded on the common law being dispersed in above a hundred volumes, I cannot conceive how this knowledge should be acquired without reading; and yet certain it is, Mr. Thrasher never read one syllable of the matter.

This perhaps was a defect; but this was not all: for where mere ignorance is to decide a point between two litigants, it will always be an even chance whether it decides right or wrong; but sorry am I to say, right was often in a much worse situation than this, and wrong hath often had five hundred to one on his side before that magistrate, who, if he was ignorant of the laws of

England, was yet well versed in the laws of nature. He perfectly well understood that fundamental principle so strongly laid down in the institutes of the learned Rochefoucault, by which the duty of self-love is so strongly enforced, and every man is taught to consider himself as the centre of gravity, and to attract all things thither. To speak the truth plainly, the justice was never indifferent in a cause but when he could get nothing on either side."

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief for Appellant were served upon Honorable Wix Unthank, Commonwealth Attorney, Harlan, Kentucky 40831, Attorney of Record for Appellees, C.B. Russell and Nathaniel "Trap" Helton, and upon Honorable Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky 40601, by mailing same, postage prepaid, on this 4th day of August, 1975.

Charles E. Goss

Charles E. Goss